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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/841,451	04/24/2001	Leslie E. Mace	4502US	5355
24247	7590	10/08/2003		
TRASK BRITT P.O. BOX 2550 SALT LAKE CITY, UT 84110			EXAMINER NASSER, ROBERT L	
			ART UNIT 3736	PAPER NUMBER
			DATE MAILED: 10/08/2003	

Please find below and/or attached an Office communication concerning this application or proceeding.

# Office Action Summary

Application No.

09/841,451

Applicant(s)

MACE ET AL.

Examiner

Robert L. Nasser

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

## Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☒ Responsive to communication(s) filed on 09 July 2003.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 1-30, 42-49, 75-88 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-8, 10-19, 21, 42-49, 75-77, 79, 81-84, 86 and 880 is/are rejected.
- 7) ☒ Claim(s) 9, 20, 78, 80, 85 and 87 is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on \_\_\_\_\_ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

## Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☒ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

## Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) \_\_\_\_\_
- 4) ☐ Interview Summary (PTO-413) Paper No(s). \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: \_\_\_\_\_

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The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-6, 8, 10-19, and 21 are rejected under 35 U.S.C. 102(b) as being anticipated by Anderson et al 4440177 in view of Kofoed et al. Anderson et al 4440177 has a respiratory monitoring device with a housing 10 having a bore, a flow sensor 66 communicating with the bore and a first and second detectors 74 and 80. The flow sensor is a differential pressure flow sensor. It does not detect the first and second substances without removing the gas from the housing. However, Kofoed et al shows an alternate method of sensing gas, by shining infrared light through a transparent housing. As such, it would have been obvious to modify Anderson et al to use the measurement scheme of Kofoed, as it is merely the substitution of one known equivalent measurement technique for another. With respect to claims 3-6, 10-19 and 21, Anderson does not show the structure of flow tube and its relationship to the analyte measure devices. Kofoed et al teaches a device making similar measurements that has the recited structure, which result in a compact device. Hence, it would have been obvious to modify Anderson et al to use the structure taught by Kofoed et al, to reduce the size of the device. The examiner notes that each monitor of the combination would have the structure of the monitor of Kofoed et al.

Claims 7, 22-27, 42-49, 75-77, 79, 81-84, 86, and 88 are rejected under 35 U.S.C. 103(a) as being unpatentable over Anderson et al '177 in view of Kofoed et al, as applied to claims 1-6, 8, 10-19, and 21, further in view of Labuda et al. In addition to

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the features shown above, the carbon dioxide sensor of the combination is an infrared sensor. The oxygen sensor is not a luminescence quenching sensor. However, Labuda et al teaches that a luminescence quenching sensor is a known oxygen measuring sensor. Hence, it would have been obvious to modify Anderson et al in view of Labuda et al to use a quenching sensor, as it is merely the substitution of one known sensor for another. The combination shows the remaining claim features, noting with respect to 47 and 48 that the window is configured to measure any respiratory airborne parameter.

Claims 9, 20, 78, 80, 85, and 87 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims. Claim 9 defines over the art of record in that none of the art shows the second detection component on a portion of the window, as claimed. Claim 20 defines over the art of record in that none of the art teaches the recited arrangement of pressure ports. Claims 78 and 85 define over the art of record in that none of the art has the first window and second windows oriented in different directions. Claims 80 and 87 define over the art of record in that none of the art has the seat arranged to orient the sources in the manner recited.

Applicant's arguments filed 7/9/2003 have been fully considered but they are not persuasive.

With respect to the Labuda reference, applicant has noted that Labuda is assigned on its face to NTC Technology Inc. as is the current application. However, this is not evidence of common ownership at the time the invention was made. The fact that the application and the reference have the same assignee is **not** sufficient evidence without the above-mentioned required statement. In other words, assignment records

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by themselves, or a mere statement of common ownership without the require statement including "at the time the invention was made," are not sufficient evidence.

With respect to the Anderson and Kofoed combination, applicant has asserted that Anderson does not provide any teaching of placing all the elements on an airway adapter. The examiner notes that the motivation to combine the references need not be in both references. In the current situation, it is the examiner's position that when viewing both references as a whole, would skilled in the art would be motivated to provide the system of Anderson et al on a airway adapter, such as that of Kofoed, in order to reduce the overall size and make the device easier to use.

In addition, applicant has asserted that there is no motivation to add another gas sensing element to Kofoed. The examiner notes that it was never suggested to modify Kofoed. Rather, Kofoed provides the teaching to modify Anderson.

Applicant has further asserted that there would be no expectation of success for the combination, as the combination would have a remotely located oxygen sensor. The basis for such a suggestion is not readily apparent, but the examiner disagrees with the premise, as it can best be understood.

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

Orr et al teaches a device with a luminescence quenching oxygen sensor.

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP

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§ 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

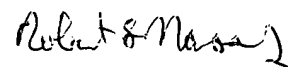
A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Robert L. Nasser whose telephone number is (703) 308-3251. The examiner can normally be reached on Mon-Fri, variable hours.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Max Hindenburg can be reached on (703) 308-3130. The fax phone number for the organization where this application or proceeding is assigned is (703) 872-9306.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-0858.

Robert L. Nasser



ROBERT L. NASSER  
PRIMARY EXAMINER